BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:March 2, 1999
Case No: 96-INA-319

In the Matter of:

SOMA TECHNOLOGIES, INC.
Employer

On Behalf of:

LIN GUO
Alien

Certifying Officer: Delores DeHaan
New York

Appearance: Ronald H. Fanta, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Lin Guo ("Alien") filed by Employer Soma Technologies, Inc.("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have

been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On or about October 14, 1994, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Field Engineer in its microcomputer software design and development business.

The duties of the job offered were described as follows:

"Employee will provide engineering services on-site in the specific areas of LAN/WAN and their peripherials design, integration, migration and troubleshooting, including hardware and popular business software in the environment of Netware V4.x/31x/2.x with multi server, Multi-topology, Bridges, Routers, Lantasiti, SAA, NFS,TCP/IP."

A Master's Degree in Computer Science was required and 1 year experience in the job offered. Wages were $31,000.00 per year. Fluency in the Chinese (Mandarin) language was required. The applicant would supervise 0 employees and report to the General Manager. (AF-1-43)

On November 29, 1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(i) in that the job requirements may be unduly restrictive, in requiring the Mandarin language. The CO also found the requirement of a Master's Degree in Computer Science was unduly restrictive. Sufficient documentation has not been presented to establish that other majors, such as Electrical Engineering, are not acceptable alternatives. The CO stated that Employer's reasoning seems to be based on subjective conclusions rather than objective reasoning and ".. is not supported by the Occupational Outlook Handbook which states that degrees in Electrical Engineering and Mathematics are usually and customarily required by employers for positions such as this." The CO instructed that Employer could readvertising to include Electrical Engineering and Mathematics or document that the requirement arises from business necessity and not preference. "Such documentation must include independent evidence that restricting major fields of study to Computer Science is normal and customary among similar employers; why, specifically, an otherwise qualified U.S. worker with a Master's Degree in Electrical Engineering or Mathematics would be unable to perform

the job duties; that all previous and current Computer System Hardware Analysts have Master's Degrees in Electrical Engineering; etc."(AF-45-48)

Employer, January 25, 1996, forwarded its rebuttal, stating that the use for Mandarin language was necessitated by its clientele, mainly Chinese. (This documentation was accepted by the CO in its Final Determination so that it was not an issue). With respect to the educational requirements, Employer listed in extensive detail the difference between the course requirements for Computer Science as opposed to Electrical Engineering or Mathematics. Thus Employer stated that the normal basic course for a Master's Degree in Computer Science "..is intended to develop confidence in a broad range of fundamental areas in the computer field that includes data structures and algorithms, programming languages, compilers, computer architecture, operating systems and artificial intelligence...The basic course work for obtaining a degree in Electrical Engineering includes the following courses, signal engineering, systems and control, electronics and networks, fields and waves, plasma and atmospheric physic, power systems and energy conversion, quantum electronics and materials science, probability, linear systems, signals, systems and transforms, advanced electronic circuity and computer architecture." Employer went on to explain that the course requirements for Electrical Engineering were too narrow and not related directly to the position offered, and made a similar analysis with respect to a Mathematics major. Employer listed six companies that offered the same or similar job duties as those set forth in the application that required a Master's degree with a major in Computer Science. Employer stated further: "..every employee of our company, who is performing the same or similar job duties as those set out in this application has been and is presently required to possess a Master's degree with a major in Computer Science." (AF-49-62)

On February 9, 1996, the CO issued a Final Determination denying certification since documentation was not responsive to the CO's requirement. While accepting Employer's documentation with respect to the Mandarin language requirement, the CO found the evidence presented with respect to the necessity of the educational requirement was inadequate. The CO stated that the Employer was apparently attempting to put the burden on the DOL in not accepting the authoritative source of the Occupational Outlook Handbook. "Although employer attempts to explain which courses are lacking in the latter two fields of study, he seems to be ignoring the fact that we asked why an 'otherwise' qualified Field Engineer/Computer Systems Hardware Analyst with a major in electrical engineering or mathematics would be unable to perform the job duties." (AF-63-65)

On March 5, 1996, Employer filed a request for review and reconsideration of Final Determination. (AF-66-79)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(*en banc*). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989)

We believe the CO was incorrect in denying certification on the basis that employer had not directly rebutted the CO's finding that the educational experience requirements was not adequately documented by Employer. According to 656.21(b)(2), where an employer specifies requirements that are not normal for the job in the United States, or that are not defined in the Dictionary of Occupational Titles, the employer must demonstrate business necessity for the requirements. See, Ivy H. Cheng, 93-INA-106 (June 28, 1994); Law Offices of Niti Crupiti, 96-INA-139 (August 26, 1997). Thus in this case it must be determined whether the employer documented the business necessity of the Master's degree in Computer Science in response to the CO's request. We believe Employer has. Employer described the necessity of having an educational background in Computer Science with direct analysis of the job duties and reasons for course requirements, as well as documenting other companies with similar requirements and stating that Employer itself had all its employees with similar requirements in similar jobs. The CO did not challenge this evidence. The CO's speculation that an applicant with other experience might meet the requirements of the job opportunity does not direct itself to the Employer's rebuttal and in essence opens a new issue not stated in the NOF. Had Employer rejected an otherwise apparently qualified applicant who had experience that would appear to directly qualify him for the job opportunity even though he lacked the exact educational requirements of Employer, the CO's position might be justified. Here, however, the CO has directed its NOF at documentation of the educational requirement. We find Employer has directly and adequately addressed the NOF. Thus Employer has met the standard established in Information Industries, 88-INA-82 (Feb. 9,1989)(*en banc*) that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business, and are essential to perform, in a reasonable manner, the job duties as described by the employer.

ORDER

The Certifying Officer's denial of labor certification is REVERSED and the matter remanded for granting of labor certification.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet

shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge